

Decision 02-10-051 October 24, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) for Authority To Increase Its Authorized Level of Base Rate Revenue Under the Electric Revenue Adjustment Mechanism for Service Rendered Beginning January 1, 1995 and To Reflect This Increase in Rates.

Application 93-12-025
(Filed December 27, 1993)

Commission Order Instituting Investigation into the Rates, Charges and Practices of Southern California Edison Company, Establishment of the Utility's Revenue Requirement, and Attrition Request.

Investigation 94-02-002
(Filed February 3, 1994)

Application of SAN DIEGO GAS & ELECTRIC COMPANY (U 902-E) for an Order Implementing Assembly Bill 265.

Application 00-10-045
(Filed October 24, 2000)

Application of SAN DIEGO GAS & ELECTRIC COMPANY (U 902-E) for Authority to Implement an Electric Rate Surcharge to Manage the Balance in the Energy Rate Ceiling Revenue Shortfall Account.

Application 01-01-044
(Filed January 24, 2001)

OPINION ON REQUEST FOR INTERVENOR COMPENSATION

This decision grants \$13,430.72 to The Utility Reform Network (TURN) for contributions to Decision (D.) 02-01-063. Compensation for work by TURN, Aglet Consumer Alliance (Aglet), and Utility Consumers Action Network

(UCAN) in Application (A.) 00-10-045 and A.01-01-044 is denied without prejudice, pending a Commission decision in that matter.

1. Background

On June 18, 2001, San Diego Gas & Electric Company (SDG&E) signed a Memorandum of Understanding (MOU) with Sempra Energy and the California Department of Water Resources (DWR). SDG&E then filed various proposals to implement provisions of the MOU.

SDG&E filed a petition to modify D.96-04-059 in order to implement certain provisions of the MOU, in A.93-12-025/I.94-02-002. D.96-04-059 had adopted a joint proposal of Southern California Edison Company (SCE) and SDG&E regarding San Onofre Nuclear Generating Station (SONGS) ratemaking treatment. The petition was resolved by D.02-01-063.

SDG&E filed to implement other provisions of the MOU in A.00-10-045/A.01-01-044, the proceeding designated to establish an interim electric surcharge to recover cost incurred by DWR on behalf of SDG&E customers. The Commission had previously adopted an interim rate in D.01-09-059. Aglet, TURN, and UCAN (Joint Intervenors) argued that SDG&E's filings to implement the MOU have created a new phase of the proceeding. The Commission has not yet issued a decision related to SDG&E's filings in A.00-10-045/A.01-01-044, but on January 23, 2002, during executive session, the Commission voted to reject a SDG&E offer to settle claims related to a petition for writ of review in the Court of Appeals; these claims concern intermediate term power procurement contracts (IT contracts). Joint Intervenors seek compensation for their contributions to the Commission's decision to reject the settlement.

On March 12, 2001, Aglet filed a timely notice of intent to claim compensation (NOI) in A.00-10-045/A.01-01-044. After review of the NOI, Assigned Commissioner Wood found Aglet eligible to file for intervenor compensation by ruling dated April 30, 2001.

On October 5, 2001,UCAN filed a timely NOI in A.00-10-045/A.01-01-044. After review of the NOI, Administrative Law Judge (ALJ) Wetzell found UCAN eligible to file for intervenor compensation by ruling dated October 30, 2001, but required UCAN to demonstrate financial hardship in its claim for compensation. TURN had been found eligible to file for intervenor compensation in A.93-12-025/I.94-02-002 by ruling dated March 15, 1994. On November 29, 2001, TURN filed an NOI in A.00-10-045/A.01-01-044, as directed by ALJ Wetzell's October 30, 2001 Ruling. After review of the NOI, ALJ Wetzell found TURN eligible to file for intervenor compensation by ruling dated February 4, 2002.

On May 17, 2002, ALJ Prestidge issued a ruling directing the Joint Intervenors to submit an analysis breaking down the compensation claimed between the efforts related to D.02-01-063 and the Commission's rejection of the proposed settlement of claims regarding the IT contracts. The ruling also indicated that we would take up the requests for these two subjects separately. On May 24, 2002, Aglet served a response on behalf of Joint Intervenors on ALJ Prestidge.

2. Requirements for Awards of Compensation

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to Pub. Util. Code §§ 1801-1812.¹ Section 1804(a) requires an intervenor to file an NOI to claim

¹ All statutory citations are to the Public Utilities Code.

compensation within prescribed time periods. The NOI must present information regarding the nature and extent of the customer's planned participation and an itemized estimate of the compensation the customer expects to request.² It may also request a finding of eligibility.

Other code sections address requests for compensation filed after a Commission decision is issued. Under § 1804(c), an intervenor requesting compensation must provide "a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding." Section 1802(h) states that "substantial contribution" means that,

"in the judgment of the commission, the customer's presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer's participation has resulted in a substantial contribution, even if the decision adopts that customer's contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate's fees, reasonable expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation."

Section 1804(e) requires the Commission to issue a decision that determines whether the customer has made a substantial contribution and what amount of compensation to award. The level of compensation must take into account the market rate paid to people with comparable training and experience who offer similar services, consistent with § 1806.

² To be eligible for compensation, an intervenor must be a "customer," as defined by § 1802(b). In today's decision, "customer" and "intervenor" are used interchangeably.

3. Timeliness of Request

Section 1804(c) requires an eligible customer to file a request for an award within 60 days of issuance of a final order or decision by the Commission in the proceeding. The Commission approved D.02-01-063 at its scheduled public meeting on January 23, 2002 and mailed it to parties of record the next day. The Commission rejected the SDG&E settlement proposal during executive session immediately following the public portion of the January 23 meeting. The sixtieth day after the January 23 meeting was Sunday, March 24. The Joint Intervenors' request for compensation was timely filed on March 25, 2002, the first working day thereafter.

4. Substantial Contribution to Resolution of Issues

Pursuant to Pub. Util. Code § 1802(h), a party may make a substantial contribution to a decision in one of several ways. It may offer a factual or legal contention upon which the Commission relied in making a decision or it may advance a specific policy or procedural recommendation that the ALJ or Commission adopted. A substantial contribution includes evidence or argument that supports part of the decision even if the Commission does not adopt a party's position in total.³ Where a party has participated in settlement

³ The Commission has provided compensation even when the position advanced by the intervenor is rejected. D.89-03-063 awarded San Luis Obispo Mothers For Peace and Rochelle Becker compensation in Diablo Canyon Rate Case because their arguments, while ultimately unsuccessful, forced the utility to thoroughly document the safety issues involved). (See also, D.89-09-103, Order modifying D.89-03-063 which stated that in certain exceptional circumstances, the Commission may find that a party has made a substantial contribution in the absence of the adoption of any of its recommendations. Such a liberalized standard should be utilized only in cases where a strong public policy exists to encourage intervenor participation because of factors not present in the usual Commission proceeding. These factors must include (1) an extraordinarily complex

Footnote continued on next page

negotiations and endorses a settlement of some or all issues, the Commission uses its judgment and the discretion conferred by the Legislature to assess requests for intervenor compensation.⁴

As we explain below, we find that Joint Intervenors' efforts in response to the MOU yielded a substantial contribution to D.02-01-063. However, we find that the Commission's action on SDG&E's proposed settlement of claims in the California Court of Appeals regarding certain power procurement contracts was not an "order or decision" within the meaning of Section 1802 (h), and that Joint Intervenors' request for compensation for their efforts with respect to those contracts is premature.

4.1 Contribution to D.02-01-063

On July 16, 2001, as part of its efforts to implement the MOU, SDG&E filed a petition for modification of D.96-04-059. That decision established ratemaking treatment for San Onofre Nuclear Generating Station Units Nos. 2 and 3 (SONGS 2&3) for both SCE and SDG&E. (SDG&E owns 20% of the SONGS units.) In its petition, SDG&E sought to commit its share of SONGS 2&3 generation to the benefit of bundled customers from 2004 through 2010, return SONGS 2&3 to cost-based ratemaking, and create a \$133 million regulatory asset called the "SONGS Equalization Adjustment" to reduce the Assembly Bill (AB) 265 balancing account undercollection.

Joint Intervenors filed a joint response in opposition to SDG&E's petition. While they supported the return of SONGS 2&3 to cost of service ratemaking,

proceeding, and (2) a case of unusual importance. Additionally, the Commission may consider the presence of a proposed settlement.)

⁴ See D.98-04-0590, *mimeo.* at 41.

they argued that with the enactment of ABX1 6, this would occur notwithstanding the MOU. Therefore, they argued, SDG&E overstated the ratepayer benefit of the MOU, and the MOU was not an appropriate basis for approving SDG&E's proposed changes. Joint Intervenors also opposed retention of the Incremental Cost Incentive Procedure through 2003 as well as the proposed SONGS Equalization Adjustment.

On September 11, 2001, Commissioner Duque issued for comment a draft decision that agreed in several respects with the arguments raised by Joint Intervenors in their joint response to SDG&E's petition. TURN filed comments and reply comments opposing the draft decision's proposal to create an AB 265 Regulatory Account, which was similar to SDG&E's proposed SONGS Equalization Adjustment.⁵ TURN argued that adoption of the regulatory account would constitute legal error because the AB 265 undercollection was not related to SONGS ratemaking. In December 2001, a revised draft decision changed the earlier draft to reject without prejudice the proposed SONGS Equalization Adjustment. On January 4, 2002, Joint Intervenors filed joint comments in support of the revised draft decision, and recommended one minor revision. The Commission's final decision, D.02-01-063, adopted the revised draft decision with the minor revision proposed by Joint Intervenors.

D.02-01-063 adopted Joint Intervenors' contentions and recommendations in response to SDG&E's petition; thus, Joint Intervenors made a substantial

⁵ TURN filed without UCAN and Aglet due to unexpected workload pressures and difficulty in coordinating a joint response.

contribution to D.02-01-063 and are entitled to compensation for the reasonable costs of their joint participation leading to issuance of the decision.⁶

4.2 Contribution to Commission Action Regarding Settlement of Litigation

Another major component of the MOU was SDG&E's request that the Commission approve a proposed settlement agreement that would resolve all issues related to SDG&E's pending petition for writ of review of D.01-01-061 and D.01-05-035, filed in the Court of Appeal, Fourth Appellate District, Division One, D038064. In those decisions the Commission held that utility-retained generation, including certain SDG&E IT contracts, should be used to serve the utility's customers at cost-based rates. The proposed settlement provided that the IT contracts would be treated as shareholder assets of SDG&E, and that SDG&E would write off, and would not collect from customers, \$219 million of the current balance in its Energy Rate Ceiling Revenue Shortfall Account (ERCRSA).

Because the Commission voted against adopting the proposed settlement of the IT contract issue pending before the Court of Appeal, Joint Intervenor's argue that ratepayer will benefit by \$144 million, the difference between the \$363 million value of the IT contracts and the \$219 million balance in the ERCRSA, until the court case is resolved. Joint Intervenor's maintain that their participation in response to the MOU resulted in a substantial contribution to the Commission's vote to reject the IT contract settlement.

⁶ Although Aglet, TURN, and UCAN generally made joint filings regarding participation in A.93-12-025/I.94-02-002, Joint Intervenor's only seek compensation for TURN's efforts related to D.02-01-063.

Section 1802(h) requires that the Commission determine whether a customer seeking a compensation award substantially assisted the Commission in the making of its order or decision because the order or decision adopted in whole or in part one or more of their factual or legal contentions or policy or procedural recommendations. This raises the question of whether the Commission's vote to reject the proffered settlement was an "order or decision" within the meaning of the intervenor compensation statutes. We conclude that it was not such a decision because the Commission did not issue a written order or decision within the meaning of Pub. Util. Code §§ 311 or 1731. Therefore, with respect to the IT contracts, we cannot reasonably determine that Joint Intervenors' participation substantially assisted the Commission in making any order or decision. Joint Intervenors' request for compensation for their participation related to the IT contracts is premature because it precedes the Commission's "order or decision" on the issues for which they claim compensation.

However, this negative determination does not prevent Joint Intervenors from seeking an award of compensation for their efforts in A.00-10-045/A.01-01-044. Because the Commission rejected the settlement involving the IT contracts, on March 28, 2002, three days after Joint Intervenors filed their compensation request, the Assigned Commissioner issued a ruling that lifted the procedural suspension of this proceeding and updated the scope of issues to be considered. As stated in that ruling, "[a]ccounting for the [IT contracts] is an important part of the determination of [the] balancing account balances" at issue in this proceeding. (Ruling, p. 6.) The work performed by Joint Intervenors as it relates to the settlement should be viewed in the context of the history which led up to an examination of the IT contracts. The question of compensation for that work

may be revisited once the issues are heard and a Commission decision is rendered on the IT contracts in A.00-10-045/A01-01-044.⁷

4.3 Overall Benefits of Participation

In D.98-04-059, the Commission adopted a requirement that a customer demonstrate that its participation was “productive,” as that term is used in § 1801.3, where the Legislature provided guidance on program administration. (See D.98-04-059, *mimeo.* at 31-33, and Finding of Fact 42.) D.98-04-059 explained that participation must be productive in the sense that the costs of participation should bear a reasonable relationship to the benefits realized through such participation. D.98-04-059 directed customers to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. This exercise assists us in determining the reasonableness of the request and in avoiding unproductive participation.

Joint Intervenors submit that the value to ratepayers from denial of SDG&E’s proposed rate of return on SONGS is approximately \$4.9 million per year. Joint Intervenors state that the effect of eliminating the SONGS sharing mechanism is dependent on future plant performance and electricity market prices. Based on past shareholder earnings under the SONGS sharing mechanism, Joint Intervenors estimate that ratepayers will receive \$16 million to \$32 million per year in benefits from the elimination of the sharing mechanism.

All of these factors lead us to conclude that the participation of Joint Intervenors related to D.02-01-063 was productive, avoided unreasonable duplication with other parties, and yielded ratepayer benefits substantially in

⁷ At this time, the Commission has held evidentiary hearings in this portion of the proceeding and a proposed decision is expected by the end of 2002.

excess of the costs incurred (less than \$14,000). We do not consider the productivity of Joint Intervenors efforts as it relates to A.00-10-045/A.01-01-044.

5. Reasonableness of Requested Compensation

Joint Intervenors request \$69,652.49⁸ as follows:

| Advocate | Represents | Year | Rate | Hours | Total |
|------------------------|------------|------------|----------|-------|--------------|
| Weil, professional | Aglet | 2001 | \$220.00 | 44.8 | \$ 9,856.00 |
| Weil, travel/IC | Aglet | 2002 | \$110.00 | 36.6 | \$ 4,026.00 |
| Finkelstein | TURN | 2001 | \$310.00 | 47.0 | \$ 14,570.00 |
| Freedman, professional | TURN | 2001 | \$200.00 | 10.5 | \$ 2,100.00 |
| Freedman, travel | TURN | 2001 | \$100.00 | 5.0 | \$ 500.00 |
| Florio | TURN | 2001 | \$350.00 | 2.0 | \$ 700.00 |
| Shames, Professional | UCAN | 2001, 2002 | \$195.00 | 127.4 | \$ 24,843.00 |
| Shames, IC | UCAN | 2001, 2002 | \$ 97.50 | 2.6 | \$ 253.50 |
| Marcus | UCAN | 2001 | \$175.00 | 60.06 | \$ 10,510.50 |
| Schilberg | UCAN | 2001 | \$130.00 | 3.51 | \$ 456.30 |
| Other Costs | | | | | \$ 1,937.19 |
| Total | | | | | \$ 69,752.49 |

According to the May 24, 2002 letter from Aglet on behalf of the Joint Intervenors, \$13,430.72 of the claimed amount relates to TURN's efforts in A.93-12-025/I.94-02-002 leading to D.02-01-063, and the remainder relates to Joint Intervenors' efforts in A.00-10-045/A.01-01-044. Because we deny without

⁸ By our calculation, the total comes to \$69,752.49.

prejudice the compensation request as it relates to A.00-10-045/A.01-01-044, our review of the reasonableness of the claim focuses on the \$13,430.72 claimed by TURN. The \$13,430.72 breaks down as follows:

| Advocate | Represents | Year | Rate | Hours | Total |
|-------------|------------|------|-----------|-------|--------------|
| Finkelstein | TURN | 2001 | \$ 310.00 | 40.0 | \$ 12,400.00 |
| Florio | TURN | 2001 | \$ 350.00 | 0.75 | \$ 262.50 |
| Other Costs | | | | | \$ 768.22 |
| Total | | | | | \$ 13,430.72 |

5.1 Hours Claimed

Time logs submitted by Joint Intervenors include a daily breakdown of hours by activity. We focus only on the time claimed by TURN related to A.93-12-025/I.94-02-002 because Aglet and UCAN did not record any time associated with A.93-12-025/I.94-02-002. TURN did not claim any hours associated with reviewing the compensation request. We find that TURN has adequately and reasonably supported the 40.75 hours for which they claim compensation related to A.93-12-025/I.94-02-002.

5.2 Hourly Rates

Section 1806 requires the Commission to compensate eligible parties at a rate that reflects the "market rate paid to persons of comparable training and experience who offer similar services." We have previously adopted the requested rates for Robert Finkelstein (\$310/hour) and Michel Florio (\$350/hour) for 2001 in D.02-06-070 and we utilize them again here. We do not address the hourly rates requested for advocates who worked only on A.00-10-045/A.01-01-044.

5.3 Other Costs

Joint Intervenors have identified \$768.22 in expenses associated with TURN's efforts related to A.93-12-025/I.94-02-002. Compensation is sought for photocopying, postage, facsimile, and telephone expenses. TURN has included detailed supporting documentation, which is further supplemented by the May 24, 2002 letter to ALJ Prestidge. We find these expenses reasonable.

6. Award to TURN

We award TURN \$13,430.72 for contributions to D.02-01-063. Consistent with previous Commission decisions, we will order that interest be paid on the award amount (calculated at the three-month commercial paper rate), commencing the 75th day after Joint Intervenors filed their compensation request. Interest will continue until the utility makes full payment. Although D.02-01-063 was issued in dockets related to Southern California Edison Company, as the utility who was the subject of the instant proceeding, SDG&E will pay the full award.

As in all intervenor compensation decisions, we put Joint Intervenors on notice that the Commission Staff may audit records related to this award. Adequate accounting and other documentation to support all claims for intervenor compensation must be made and retained. The records should identify specific issues for which Joint Intervenors request compensation, the actual time spent, the applicable hourly rate, and any other costs for which compensation is claimed.

7. Waiver of Comment Period

Pursuant to Rule 77.7(f)(6), the otherwise applicable 30-day period for public review and comment is being waived.

8. Assignment of Proceeding

A.93-12-025/I.94-02-002 is assigned to Commissioner Duque and ALJ Econome. A.00-10-045/A.01-01-044 is assigned to Commissioner Wood and ALJs Wetzell and Wong. ALJ Cooke is assigned to the intervenor compensation request.

Findings of Fact

1. Joint Intervenors have made a timely request for compensation for their contributions to D.02-01-063.
2. TURN contributed substantially to D.02-01-063.
3. The participation of TURN was productive in that the costs claimed for its participation were less than the benefits realized.
4. TURN requests hourly rates for Finkelstein and Florio that have previously been approved by the Commission.
5. The hours claimed for work performed by Finkelstein and Florio in A.93-12-025/I.94-02-002 are itemized and reasonable.
6. The miscellaneous costs incurred by TURN in A.93-12-025/I.94-02-002 are reasonable.

Conclusions of Law

1. TURN has fulfilled the requirements of §§ 1801-1812, which govern awards of intervenor compensation.
2. TURN should be awarded \$13,430.72 for contributions to D.02-01-063.
3. Per Rule 77.7(f)(6) of the Commission's Rules of Practice and Procedure, the comment period for this compensation decision may be waived.
4. This order should be effective today so that TURN may be compensated without unnecessary delay.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) is awarded \$13,430.72 in compensation for its substantial contribution to Decision 02-01-063.
2. The request for compensation by Aglet Consumer Alliance, TURN, and Utility Consumers Action Network for work performed in Application (A.) 00-10-045 and A.01-01-044 as it relates to implementation of San Diego Gas & Electric Company's (SDG&E) Memorandum of Understanding is denied without prejudice as premature.
3. SDG&E shall pay TURN the award granted by Ordering Paragraph 1. Payment shall be made within 30 days of the effective date of this order. SDG&E shall also pay interest on the award at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release H.15, beginning with the 75th day after March 25, 2002, the date the requests were filed.
4. The comment period for today's decision is waived.
5. A.93-12-025 and I.94-02-002 are closed.

This order is effective today.

Dated October 24, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners

A.93-12-025 et al. ALJ/MLC/tcg

Compensation Decision Summary Information

| | |
|----------------------------------|-------------------------------------|
| Compensation Decision(s): | D0210051 |
| Contribution Decision(s): | D0201063 |
| Proceeding(s): | A9312025/I9402002/A0010045/A0101044 |
| Author: | ALJ Cooke |
| Payer(s): | San Diego Gas & Electric Company |

Intervenor Information

| Intervenor | Claim Date | Amount Requested | Amount Awarded | Reason Change/ Disallowance |
|---|-------------------|-------------------------|-----------------------|------------------------------------|
| Aglet Consumer Alliance/The Utility Reform Network/ Utility Consumers Action Network | 3/25/02 | \$69,652.49 | \$13,430.72 | premature |

Advocate Information

| First Name | Last Name | Type | Intervenor | Hourly Fee Requested | Year Hourly Fee Requested | Hourly Fee Adopted |
|-------------------|------------------|-------------|----------------------------|-----------------------------|----------------------------------|---------------------------|
| Robert | Finkelstein | Attorney | The Utility Reform Network | \$310 | 2001 | \$310 |
| Michel | Florio | Attorney | The Utility Reform Network | \$350 | 2001 | \$350 |